

THE FINNISH LENIENCY REGIME UNDER REVIEW

D&I Focus
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- Amendments to the Competition Act are expected
- When would leniency be available?
- More predictability for fine reductions
- A marker system
- Summary applications
- Extended cooperation obligations
- Confidentiality of leniency applications

> AMENDMENTS TO THE COMPETITION ACT ARE EXPECTED

A leniency program was introduced to the Finnish Act on Competition Restrictions (480/1992, "Competition Act") in 2004. The purpose of the leniency program is to encourage companies to cooperate with the competition authorities by voluntarily providing information and evidence on illegal cartel activity against non-imposition or reduction of administrative fines.

The Finnish Competition Authority ("FCA") does not have the power to impose fines. The FCA investigates the matter and, if appropriate, makes a proposal to the Market Court for the imposition of fine. If the FCA finds that an investigated company fulfills the conditions for full leniency, it will not propose a fine to the company at all. The FCA's decision to award leniency cannot be appealed. If the company has considerably assisted the FCA but the conditions for full leniency are not fulfilled, the FCA can include an appropriate reduction in the amount of fine in its proposal to the Market Court. The Market Court may depart from the proposed amount upwards or downwards. Contrary to full leniency, reduction of fines is available also for other competition restrictions than secret cartels.

Several amendments to the current leniency regime are proposed under a government bill on the new Competition Act which was submitted to the Finnish Parliament on 11 June 2010 (the "Government Bill").

The proposals aim to increase predictability of the leniency system

The proposed changes aim to increase the predictability of the Finnish leniency system as well as to align the Finnish leniency rules with the Commission's Leniency Notice and with the Model Leniency Program of the European Competition Network ("ECN Model Program"). The extent of the proposed changes varies from detailed clarifications to introduction of new substantive rules.

This article presents the most significant proposals regarding leniency in the Government Bill. Members of our Competition and Public Procurement practice are happy to provide more detailed information on the Finnish leniency program.

> WHEN WOULD LENIENCY BE AVAILABLE?

Under the current leniency rules, a leniency application must contain information which allows the FCA to intervene with a competition restriction. An application for immunity from fines must thus be submitted to the FCA before the FCA conducts an inspection in the premises of the alleged cartel participants or receives similar information from other sources.

Leniency could be available even after a surprise inspection

It is proposed that full leniency could be granted also to the first applicant that provides the FCA with new relevant evidence which allows the FCA to establish the existence of the infringement. In contrast with the current rules, the applicant could under certain circumstances be entitled to immunity from fines even if the information is delivered to the FCA after it has performed an inspection in the premises of the alleged cartel participant. This would require that no other party has already been granted conditional immunity relating to the same infringement.

Coercers would not be granted leniency but reduction of fines is not excluded

The current Competition Act does not address the issue of coercers' entitlement to leniency. Therefore, it is proposed that coercers would be explicitly excluded from the benefit of immunity. A coercer would, nevertheless, continue to be eligible for a reduction of fines if it considerably assists the FCA in the investigation.

A coercer refers to an undertaking which forces other undertakings to participate in the cartel. An undertaking which has otherwise been active or has had a leading role in the establishment or operations of a cartel is not considered a coercer. Such undertakings would thus continue to be entitled to full leniency.

> MORE PREDICTABILITY FOR FINE REDUCTIONS

Currently, the level of the reduction of fine that may be granted to an undertaking which does not fulfill the conditions for full leniency is in the FCA's sole discretion. This lack of transparency in the imposition of fines is assumed to prevent cartel participants from cooperating with the FCA because they are not able to predict the benefits aligned with the cooperation. Furthermore, the current rules do not provide benefits for undertakings to cooperate with the FCA at an early stage of the investigation.

To encourage active cooperation, the Government Bill introduces a percentage scaling for fine reductions in cartel cases. A reduction in fine could be granted to undertakings that provide new information or evidence to the FCA which is relevant in establishing the cartel infringement or clarifying its scope, extent or nature. Accordingly, a fine would be reduced by

- (i) 30 to 50 percent for the first undertaking that provides such information and evidence;
- (ii) 20 to 30 percent for the second undertaking; and
- (iii) maximum 20 percent for undertakings providing such information and evidence thereafter.

A reduction of fines would have to be applied separately

The Government Bill would not otherwise change the conditions of eligibility for a fine reduction in cartel cases. However, it is proposed that an applicant who is not eligible for full leniency would have to specifically apply for the reduction of the fine. In other words, if an application for full leniency were rejected, the same application would no longer automatically be considered as an application for the reduction of fines.

Cooperation can be rewarded also in other investigations than cartels

The scale of reduction of fines would not be applied to other competition law infringements than cartels. The FCA may, nevertheless, decide to reduce the amount of fine proposed to the Market Court also with respect to other infringements if a company has significantly assisted the FCA in the investigation.

> A MARKER SYSTEM

A formal marker system would be introduced

The Government Bill introduces a formal marker system to the Finnish leniency regime. It is proposed that an undertaking wishing to make a leniency application may initially apply for a so called marker which establishes its place in the queue of applicants for a given period of time specified by the FCA. Such a period is granted to allow the applicant to gather the information and evidence necessary to meet the evidential threshold for immunity. If the applicant provides the FCA with the required information within the agreed timeframe, the information and evidence will be deemed to have been submitted on the date when the marker was granted.

The Government Bill also specifies the information required for a marker along the lines of the Model Leniency Program. Accordingly, the applicant must identify itself, the information it intends to submit to the FCA and the timeframe within which the information is to be submitted. In addition, the application must specify the grounds for submitting the leniency application, the nature and duration of the alleged cartel, the parties thereto, the affected products and territories and the related leniency applications and applications for reduction of fines to competition authorities within and outside the European Union, if any.

> SUMMARY APPLICATIONS

An application for leniency to one competition authority is not considered as an application for leniency to another authority. It is therefore in the interest of the applicant to apply for leniency to all competition authorities which have competence to apply competition rules in the case concerned.

Under the ECN Model Program, a leniency applicant in one country wishing to apply for leniency to the European Commission may do so by submitting the Commission a so called summary application containing a short description of the competition restriction. The Competition Act currently in force does not explicitly recognize summary applications. In practice, similar information may, however, fulfill the requirements for national initial information and thus enable summary applications.

Summary applications based on an application to another authority would be formally recognized

It is now proposed that a summary application system would be included in the Finnish leniency regime. The proposal is based on the ECN Model Program but allows more extensive use of summary applications. Accordingly, the FCA could grant conditional immunity on the basis of a summary application provided that a full leniency application would be submitted either to the Commission or to any national competition

authority within the EU. A summary application must contain similar information that is required for a marker. The applicant must also identify the EU member state(s) where the evidence is likely to be located and any applications for leniency or reduction of fines relating to the same infringement. In addition, the applicant is obligated to provide additional information on FCA's request.

> EXTENDED COOPERATION OBLIGATIONS

The FCA will only grant leniency or a reduction of fines to an undertaking which complies with all the statutory cooperation obligations. These will be specified in more detail in the new Competition Act.

The Government Bill proposes that a leniency applicant will be obliged to keep confidential both the submission and the content of the application, and even its considerations regarding whether to apply for leniency or reduction of fines. This confidentiality obligation would not prevent the applicant from applying for leniency with the European Commission or with other national competition authorities.

Leniency applicant must not destroy evidence before or after the leniency application

In addition, the leniency applicant would be explicitly prohibited from destroying evidence on the competition restriction also before the submission of the application to the FCA.

The Government Bill also includes a significant procedural clarification. According to the current wording of the Competition Act, an undertaking must immediately cease its participation in cartel activity after submitting a leniency application to the FCA. This has sometimes made the investigation more difficult for the FCA and it has, in practice, often requested that the applicant would not immediately withdraw from the cartel by referring to the general cooperation obligation.

The FCA can request the leniency applicant to continue its participation in the cartel

An explicit provision is proposed according to which the FCA can request a leniency applicant to continue its participation in the cartel activities provided that it is necessary for securing the investigation. The applicant would only be entitled to continue its involvement in the cartel activities in accordance with the FCA's instructions and to the extent it is deemed necessary by the FCA. This amendment aims to secure the FCA's possibility to conduct surprise investigations.

> CONFIDENTIALITY OF LENIENCY APPLICATIONS

The Competition Act does not include any provisions relating to confidentiality of leniency applications. Confidentiality is regulated by the general Act on the Openness of Government Activities (621/1999,

"Openness Act") according to which all documents written by public authorities or submitted to them are public unless there is a legitimate reason to classify the document as confidential. Protection of e.g. business secrets typically qualifies as such legitimate reason.

On the basis of the Openness Act, anyone has a right to request copies of public documents from public authorities. However, the Supreme

Administrative Court has held that the documents submitted to the FCA by the leniency applicant are considered secret under the Openness Act during the cartel investigation. After the FCA has given its decision, the documents submitted by the leniency applicant, including the statement containing the confession, should currently not be given special treatment. The FCA can refuse to disclose business secrets but a claimant in private litigation can request the authorities to disclose such versions of the relevant documents from which business secrets have been removed.

Documents submitted for leniency purposes would be considered secret

Due to limited private litigation to date in Finland, no national precedents relating to the use of leniency documents and their evidentiary value exist. It has, however, been recognized that confidentiality issues make leniency less appealing to companies. In order to better protect the confidentiality of leniency documents, it is proposed that the Competition Act be amended. The aim is to specifically exclude from private litigation information and evidence submitted for the purposes of obtaining leniency.

Leniency documents would thus include at least the so called corporate statement in which the company describes its involvement in the cartel. It appears that also any existing documents attached to a leniency application would be considered confidential for the purposes of private litigation and the FCA would no longer disclose them at any stage.

Use of leniency documents in private litigation would be prohibited

Further, the new Competition Act would specifically prohibit the use of leniency documents submitted to the FCA in private litigation. It is understandable that the competition authorities do not wish to be in the position in which they can be forced to disclose leniency documents for private litigation. The very wide definition of leniency documents in the Competition Act mainly aims to solve the secrecy issue of the competition authorities and protect the secrecy of corporate statements. As regards other documents than the corporate statement, the interpretation of the prohibition is, in practice, left to the district courts.

However, we would expect that the prohibition to use leniency documents in private litigation will not automatically cover documents submitted to the FCA which the parties to the litigation can obtain from other sources or which already are in their possession. Nevertheless, it is eventually the district court which must decide whether and on which basis existing documents which have been submitted to the FCA as a part of leniency application could be used in private litigation, in particular, if it is requested to order the opposing party to disclose such documents because they are relevant as evidence.

The proposed change would not restrict the companies involved in the FCA investigation from reviewing leniency documents. They would be bound by the confidentiality obligations stated in the Openness Act and would not be allowed to use them in other proceedings.

As the amendment would only limit the use of leniency-related documents and evidence in private litigation, the FCA could use the information for establishing other competition law infringements or transfer information to other competition authorities.



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